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Recommended Citation

Christine M. Fenner, *Artists' Rights After Ringgold v. Black Entertainment Television, Inc.: Fair Use Analysis of a Visual Work within a Television Show*, 8 DePaul J. Art, Tech. & Intell. Prop. L. 327 (1998)
Available at: <http://via.library.depaul.edu/jatip/vol8/iss2/4>

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**ARTISTS' RIGHTS AFTER
*RINGGOLD v. BLACK ENTERTAINMENT
TELEVISION, INC.:*
FAIR USE ANALYSIS OF A VISUAL WORK
WITHIN A TELEVISION SHOW ¹**

INTRODUCTION

The Copyright Act of 1976 grants certain rights to the copyright owner including the right to make, distribute, and derive works based on the original, display the copyrighted work publicly and seek royalties from others who wish to use the copyrighted work.² However, sometimes a defendant will use such a minimal amount of a copyrighted work that the law will not impose legal consequences.³ Additionally, §107 of the Copyright Act states other uses are fair for the purposes of criticism, comment, news reporting, teaching, scholarship, or research.⁴ To determine if the use is fair, courts consider the four factors enumerated in the Act.⁵ *Ringgold v. Black Entertainment Television, Inc.* is a recent case which addresses the claim that infringement exists when a copyrighted visual work is used within another copyrighted visual work.⁶ The court looked to the factors of de minimus and fair use to determine the rights of the copyright owner, while at the same time giving lower courts direction in determining the controversies of fair use of copyrighted works on the Internet.⁷

Part I of this case note discusses the history of fair use, and comments on cases and statutes which are the foundation of the fair use defense. Part II discusses the facts of *Ringgold v. Black Entertainment Television, Inc.*, including the painting itself and the

1. *Ringgold v. Black Entertainment Television, Inc.*, 126 F.3d 70 (2d Cir. 1997).

2. 17 U.S.C. §107(1994).

3. *Ringgold*, 126 F.3d at 74.

4. §107.

5. *Id.*

6. *Ringgold*, 126 F.3d at 70.

alleged infringing use. Part III looks at the district court's and the court of appeal's analysis of the case, and Part IV looks to the impact of the court of appeal's analysis in *Ringgold* upon the fair use and its potential application to the Internet and future technology.

I. THE HISTORY OF FAIR USE

A. *The beginning of fair use in the United States: Folsom v. Marsh*⁸

The first case to introduce the doctrine of fair use in the United States was the 1841 case of *Folsom v. Marsh*.⁹ The plaintiffs, printers and publishers, Folsom, Wells, and Thurston, published Jared Spark's twelve volume biography of George Washington which included correspondence, addresses, and other papers, both official and private. With still eight years left on Spark's copyright, the defendants published a two volume biography of George Washington consisting of 866 pages, 388 of which were copied verbatim from Spark's work. The defendants in *Folsom* admitted to using the plaintiff's work, but asserted that they had the right to quote, select and abstract from the work of the plaintiff since their work was independent and entirely distinct.¹⁰ While Justice Story noted in his opinion that often it is quite obvious when infringement of a copyrighted work has occurred, other times it is exceedingly difficult and depends, "upon a nice balance of the comparative use made in one of the materials of the other."¹¹ The factors discussed in the opinion included the nature and objects of the selections made, the quantity and value of the selections, and the degree in which the selections chosen would effect the market value, diminish the profits or supersede the objects of the original.¹² The most important factor, in Justice Story's view, was whether the new work would "supersede the use of the original

8. *Folsom v. Marsh*, 9 F.Cas. 342 (C.C.D.Mass. 1841)(No. 4901).

9. *Id.*

10. *Id.* at 342.

11. *Id.* at 344.

12. *Folsom*, 9 F.Cas. at 348.

work and substitute the review for it.”¹³ A two part test developed, reviewing two related considerations: whether the use of the copyrighted work served a “new and different purpose” to the second work or whether the new work was a substitute for the original work.¹⁴

In determining that the use of the defendants was not fair, Justice Story stated that to find to the contrary would totally destroy the plaintiff’s copyright.¹⁵ More importantly, the defendants use of the letters in their books, not only constituted one-third of their book, but also took the “essential value” from the plaintiff’s books.¹⁶ The letters chosen by the defendants were the most interesting and of the most value to the public because they clearly illustrated the character of George Washington, the subject of the book.¹⁷ Without the letters the defendants took from the work of the plaintiff, the book would have failed and thus their use of the letters was not fair.¹⁸

B. The 1976 Copyright Act

Copyright is not a divine right and does not confer to authors absolute ownership.¹⁹ Copyright law confers a monopoly for a limited period of time to authors and artists.²⁰ The purpose of copyright law is to “stimulate activity and progress in the arts for the intellectual enrichment of the public.”²¹ Society benefits from copyright law because the law gives incentives to those who produce creative works and therefore society can obtain the “intellectual and practical enrichment that results from creative

13. *Id.* at 345

14. Pierre N. Leval, Essay, *Nimmer Lecture: Fair Use Rescued*, 44 UCLA L. REV. 1449 (1997).

15. *Folsom*, 9 F.Cas at 349.

16. *Id.*

17. *Id.*

18. *Id.*

19. Pierre N. Leval, Commentary, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990).

20. *Id.* at 1109.

endeavors.”²² Congress has been given the power to enact Copyright legislation by the Constitution which states that Congress can “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”²³

When Congress drafted the Copyright Act of 1976, it intended to restate the judicial doctrine of fair use, which had begun with Justice Story in *Folsom v. Marsh*.²⁴ Congress wanted to continue along the lines of the case law without drawing any bright line distinctions, requiring fair use to be applied on a case by case basis.²⁵ Section 107 of the Copyright Act begins with a simple assertion stating “the fair use of a copyrighted work...is not an infringement of copyright.”²⁶ Based on Justice Story’s analysis in *Folsom*, Congress listed four factors which courts should consider when determining whether fair use is present: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.²⁷ Congress expected courts to apply these four criteria in the same manner as they had prior to the enactment of the statute. Unfortunately, early decisions did not follow the intentions of Congress.

C. *Sony Corporation of America v. Universal City Studios*²⁸

The first case which the Supreme Court of the United States reviewed after the enactment of the Copyright Act of 1976 was

22. *Id.* at 1109.

23. US CONST. art I, §8, cl.8.

24. Leval, *supra* note 14, at 1449.

25. *Id.*

26. §107.

27. *Id.*

28. *Sony Corp. of Amer. v. Universal City Studios, Inc.*, 464 U.S. 417

*Sony Corporation of America v. Universal City Studios.*²⁹ The plaintiffs, Universal Studios and Walt Disney, alleged that Sony was liable for copyright infringement allegedly committed by Betamax consumers who taped television shows and movies for watching at a later time.³⁰ In order to ensure that production of the Betamax would not be enjoined, the majority of the Court found the Betamax was being used for substantial non-infringing uses, such as the recording and replaying of public domain material and material from owners who did not object.³¹ Therefore judgment was entered for the defendants.³² Unfortunately the Court's analysis strayed from past cases and created new controversies.

In analyzing the first factor, "the purpose and character of the use," the Court relied on the second half of the factor which looks to whether the "use is of a commercial nature or is for nonprofit educational purposes."³³ Although Congress clearly stated, when drafting the Copyright Act of 1976, that fair use was to be analyzed as it had in the past, the Court in *Sony* made commercial use of a copyrighted work presumptively unfair.³⁴ Clearly the court ignored the fact that most works, even those of an academic nature, involve some type of commercial activity.³⁵ However, time shifting for private home use was considered a noncommercial activity.³⁶ Additionally, the Court rejected the distinction, as discussed by Justice Story in *Folsom*, between "quoting that merely supersedes the original...and transformative quoting for new objectives."³⁷ Although it agreed with the Ninth Circuit Court of Appeals that the taping of television shows for later viewing by a private audience did not add any intellectual improvement to the

29. *Id.*

30. *Id.* at 418.

31. *Id.* at 447.

32. *Id.* at 455.

33. §107.

34. *Sony*, 464 U.S. at 449.

35. Leval, *supra* note 14, at 1456.

36. *Sony*, 464 U.S. at 449.

37. Leval, *supra* note 14, at 1456.

show, the Court stated that the Ninth Circuit had overemphasized that factor.³⁸

In analyzing the fourth factor, “the effect of the use upon the potential market for the copyrighted work,” the Court stated that a use which does not impair a copyright holder’s ability to license or obtain benefits from her work, would be considered fair.³⁹ This decision was justified by explaining that the purpose of the Copyright Act is to create incentives for an artist.⁴⁰ If non-commercial uses were prohibited, that prohibition would only inhibit access to ideas without benefiting the copyright holder.⁴¹ Clearly the Court analyzed this factor while reviewing the first element which created a presumption of fair use for noncommercial activities. This departure from the past, in addition to the creation of a new presumption created much controversy in this area, requiring the Court to go back and revisit the doctrine of fair use in future cases.

*D. Harper & Row Publishers, Inc. v. Nation Enterprises*⁴²

Another case that added to the fair use analysis is *Harper & Row Publishers v. Nation Enterprises*.⁴³ Harper brought suit alleging violations of the Copyright Act after The Nation published excerpts from Harper & Row’s yet unpublished autobiography of Gerald Ford, which The Nation had obtained from an unidentified source.⁴⁴ The news story was composed of quotes, paraphrases, and facts drawn directly from the manuscript.⁴⁵ The Nation claimed fair use because the quotations were used for news reporting.⁴⁶

38. *Id.* at 1457.

39. *Sony*, 464 U.S. at 450.

40. *Id.*

41. *Id.* at 451.

42. *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985).

43. *Id.*

44. *Id.* at 543.

45. *Id.*

46. *Id.*

In analyzing the first factor, the Court, with an opinion written by Justice O'Connor, followed the reasoning in *Sony* and stated that "every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright."⁴⁷ Justice O'Connor then expanded this doctrine and made a distinction between profit and nonprofit use.⁴⁸ The sole motive of the use does not need to be only monetary gain but looks instead to whether the user "stands to profit from exploitation of the copyrighted material" without paying for the rights to use the material.⁴⁹ Finally, the Court found that The Nation's use of the quotations from the autobiography were in bad faith because The Nation's intent was to supplant the copyright holder's "commercially valuable right of first publication."⁵⁰ Clearly the Court found commercial use and ruled against the defendant on this factor.

In analyzing the fourth factor, the effect on the market for the original work, Justice O'Connor stated this factor is undoubtedly the single most important factor.⁵¹ Additionally, the unpublished nature of book precluded the defense of fair use due to its strong effect on the potential market for the copyrighted work.⁵² Although this part of the opinion is considered dictum, Courts followed its line of reasoning until the decision of *Campbell v. Acuff-Rose Music* clarified the fair use doctrine.⁵³

*E. The return to a proper fair use analysis in Campbell v. Acuff-Rose Music, Inc.*⁵⁴

The Court granted certiorari in *Campbell v. Acuff-Rose Music* in order to re-examine the prior cases and return to the application of

47. *Harper & Row*, 471 U.S. at 562.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 566.

52. *Harper & Row*, 471 U.S. at 568.

53. Leval, *supra* note 14, at 1459.

54. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

fair use that was intended when the Copyright Act of 1976 was written.⁵⁵ In *Campbell*, Acuff-Rose filed suit for copyright infringement against members of the rap group, 2 Live Crew, when they created a parody from Roy Orbison's song, "Pretty Woman."⁵⁶ In determining that the use by 2 Live Crew was fair, Justice Souter re-examined the *Sony* decision which held that all commercial uses are unfair.⁵⁷

First, Justice Souter looked to the original intent of Congress, which was "to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way."⁵⁸ Additionally, the Copyright Act of 1976 was only a codification of Justice Story's analysis in *Folsom* and was meant to continue the common-law tradition of fair use adjudication.⁵⁹ Congress did not intend to simplify the process of adjudication by drawing bright-line rules, but rather called for a case-by-case analysis.⁶⁰

In analyzing the first factor, the Court returned to Justice Story's discussion by considering whether the new work merely supersedes the objects of the original creation or adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.⁶¹ Again, the Court looked to whether the work was transformative.⁶² After reviewing the language of the statute, the Court concluded that the fact that a use is commercial does not deem that use presumptively unfair.⁶³ The commercial or nonprofit, educational character of a work is not conclusive, but is "weighed along with others in fair use decisions."⁶⁴

Additionally, the Court reviewed the fourth factor, which is the "effect of the use upon the potential market for or value of the

55. *Id.*

56. *Id.* at 473.

57. *Id.* at 578.

58. *Id.* at 577.

59. *Campbell*, 510 U.S. at 576.

60. *Id.* at 577.

61. *Id.* at 478.

62. *Id.*

63. *Id.* at 584.

64. *Campbell*, 510 U.S. at 585.

copyrighted work.”⁶⁵ Not only is the Court required to look to the extent of the market harm, but it also must look to whether “unrestricted and widespread conduct of the sort engaged in by the defendant...would result in a substantially adverse impact on the potential market.”⁶⁶ The Supreme Court rejected the reasoning from *Sony*, which stated that if the intended use of the copyrighted material is for commercial gain, then the likelihood of significant market harm may be presumed.⁶⁷ Instead, it stated that no presumption of market harm could be found in a case which involves more than the duplication for commercial purposes.⁶⁸ The facts in *Sony* give rise to the presumption of market harm because the mere duplication of copyrighted works clearly supersedes the original and serves as a market replacement for it.⁶⁹ By contrast, a parody, such as that in *Campbell*, is a new work, which may not necessarily affect the market for the original because the parody and the original serve different market functions.⁷⁰ In conclusion, the court dismissed the presumption of unfair use when a work is commercial and stated that in the future, courts must weigh all four factors equally.

II. FACTS OF RINGGOLD V. BLACK ENTERTAINMENT TELEVISION⁷¹

A. *The Copyrighted Work*

Faith Ringgold, a successful, contemporary artist, created a new type of expression labeled “Story Quilt Design,” which consists of a painting, handwritten text, and quilting fabric used to communicate parables with reference to the African American experience in the early 1900’s.⁷² Ringgold’s artwork has a quilted

65. *Id.* at 590.

66. *Id.*

67. *Id.* at 591.

68. *Id.*

69. *Campbell*, 510 U.S. at 591.

70. *Id.* at 592.

71. *Ringgold*, 126 F.3d at 70.

border with multi-colored triangular shapes of fabric and a thin red welt around the edge.⁷³ The painting is on a silk screen and both above and below the painting are twelve numbered panels which depict language written in the idiomatic African American dialect of the era.⁷⁴ Church Picnic Story Quilt, “Church Picnic,” or “story quilt” depicts a Sunday school picnic held by the Freedom Baptist Church in Atlanta, Georgia, in 1909.⁷⁵ The text conveys the thoughts of one of the parishioners who attended the picnic, but now waits at home for her daughter, who could not attend the picnic, to return.⁷⁶ Her daughter is in love with the church’s pastor, but the pastor is in love with another woman.⁷⁷ He soon plans to ask the woman to marry him despite the fact that his high society family does not want him to marry her because she was born out of wedlock.⁷⁸

Ringgold has retained all rights to her artwork but the piece itself is displayed by the High Museum in Atlanta, Georgia, which owns the work.⁷⁹ Since 1988 the museum had a non-exclusive license to reproduce church picnic as a poster, but that license has now been terminated.⁸⁰ The poster was not part of a limited edition and thousand’s were sold for twenty dollars a copy.⁸¹ Although the museum no longer has a license to reproduce the poster, it still has copies for sale.⁸²

Underneath the reproduced artwork, the poster contains the words “Church Picnic” which are above the words “High Museum of Art,” which are in letters 1¼ inches high.⁸³ The third line, in letters only 1/8 inch high, states “Faith Ringgold, Church Picnic Story Quilt, 1988, gift of Don and Jill Childress.”⁸⁴ Finally, below

73. *Id.*

74. *Id.*

75. *Id.*

76. *Ringgold*, 126 F.3d at 72.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Ringgold*, 126 F.3d at 72.

82. *Id.*

83. *Id.*

84. *Id.*

this, in even smaller type, appears the phrase "Courtesy Bernice Steinbaum Gallery, New York City. Poster 1988 High Museum of Art, Atlanta."⁸⁵

B. The Alleged Infringing Use

HBO produces a television sitcom entitled "ROC", which depicts a middle-class African American Family in Baltimore, Maryland.⁸⁶ In one episode, the poster of "Church Picnic," presumably sold by the museum, was used as a wall hanging on the set of ROC which represented a church assembly hall.⁸⁷ The poster was shown nine times, ranging from 1.86 seconds to 4.16 seconds at a time for a total viewing time of 26.75 seconds during the episode.⁸⁸ Although no action, dialogue, or camera work draws a viewer's attention to the poster, two characters stand just to the left of the poster which sometimes placed the poster in the center of the screen.⁸⁹ The poster was framed without the words identifying the museum but included a notice of copyright which was too small for the television viewer to read.⁹⁰

A broadcast television network televised the episode of ROC in 1992.⁹¹ In October 1994, BET aired the show for the first time on cable television and ran the episode again in January of 1995.⁹² It was in January of 1995, while Ringgold happened to be watching the broadcast, that she discovered the alleged infringing use.⁹³

85. *Id.*

86. *Ringgold*, 126 F.3d at 72.

87. *Id.*

88. *Id.* at 73.

89. *Id.*

90. *Id.*

91. *Ringgold*, 126 F. 3d at 73.

92. *Id.*

93. *Id.*

III. LEGAL ANALYSIS

Faith Ringgold alleges that the BET's and HBO's use of her artwork violates various New York State and Federal laws.⁹⁴ The plaintiff's federal claim is copyright infringement due to the unauthorized use of her poster as a set decoration in violation of 17 U.S.C. §106.⁹⁵ Under New York law, Ringgold alleged common law unfair competition and violation of New York's statute protecting authorship rights.⁹⁶ Prior to discovery, the defendants moved for summary judgment claiming they were not liable for copyright infringement because their use was either de minimus or fair.⁹⁷ The defendants also claimed that the unfair competition claim was preempted by the Copyright Act and either the plaintiff had not stated a claim under the Artists Authorship Rights Law or the court should decline to exercise supplemental jurisdiction over the state law claims.⁹⁸ Prior to her motion for summary judgment, Ringgold moved for a preliminary injunction to prevent further use of her work.⁹⁹

The District Court for the Southern District of New York denied plaintiff's motion for a preliminary injunction, granted defendant's motion for summary judgment and dismissed the complaint.¹⁰⁰ The court rejected the copyright infringement claim, stating the defendant's use of her work was fair.¹⁰¹ Additionally, on the ground of preemption, the court rejected the unfair competition claim and declined to exercise supplemental jurisdiction over the remaining state claims.¹⁰² The plaintiff appealed the district court decision on the issue of copyright infringement and the defendants claimed de minimus and fair use as their defense.¹⁰³ This case note

94. *Id.*

95. *Id.*

96. *Ringgold*, 126 F. 3d at 73.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Ringgold*, 126 F. 3d at 73.

102. *Id.*

103. *Id.*

is primarily concerned with the fair use aspect of this case and therefore the de minimus claim will not be discussed.

A. The Purpose and Character of the Use.

1. The District Court

The district court, in determining that the defendant's use of the poster was incidental, gave four reasons why this factor weighed in favor of BET and HBO.¹⁰⁴ First, the court stated that the defendant's use of the poster was not a tool to encourage viewers to watch or to promote the television show.¹⁰⁵ The court compared this case to *Amsinck v. Columbia Pictures Industries, Inc.*, which involved the use of the plaintiff's mobile in several nursery scenes of a motion picture.¹⁰⁶ In *Amsinck*, the court stated that the first factor weighed in favor of the defendants because the copyrighted work was not used for advertisements or to entice viewers to see the movie.¹⁰⁷

Second, the district court in *Ringgold* found that the defendants use did not try to exploit *Ringgold's* work and distinguished this case from *Woods v. Universal City Studios*.¹⁰⁸ The plaintiff in *Woods* created a graphic pencil design drawing which was published in a catalog.¹⁰⁹ The United States District Court for the Southern District of New York in *Woods* found a likelihood of success on the copyright infringement claim because the motion picture studio designed the set after seeing the plaintiff's drawing

104. *Ringgold v. Black Entertainment Television, Inc.*, No. 96 Civ. 0290, 1996 WL 535547 (S.D.N.Y. Sept. 19, 1996).

105. *Id.* at *3.

106. *Amsinck v. Columbia Pictures Indus., Inc.*, 862 F. Supp. 1044 (S.D.N.Y. 1994).

107. *Id.* at 1049.

108. *Woods v. Universal City Studios, Inc.*, 920 F. Supp. 62 (S.D.N.Y. 1996).

and then used the set in the movie "12 Monkeys", clearly exploiting the plaintiff's work.¹¹⁰

Third, the poster was used only as a way to portray an African-American Church and therefore its presence was incidental to the scene.¹¹¹ The court found this use was similar to the use in *Amsinck*, which placed the plaintiff's mobile in a scene depicting a nursery.¹¹² Both the mobile in *Amsinck* and the Poster in *Ringgold* were used to add authenticity to the scene and the court believed that to be incidental.¹¹³

Finally, the district court stated that this was not a case of competing uses, in which reproduction of the copyrighted work in the television show would serve as a substitute for someone who wishes to own a copy of the poster.¹¹⁴ The court compared the defendant's use of the poster to both *Amsinck*¹¹⁵ and *Mura v. Columbia Broadcasting System, Inc.*¹¹⁶ In *Amsinck*, the court found that the plaintiff marketed her work as "pleasing and evocative painted figures" used on a mobile for a child's crib.¹¹⁷ The film's use of that mobile would not substitute for someone's desire to own the mobile and therefore would not create a competition.¹¹⁸ Similarly in *Mura*, the United States District Court for the Southern District of New York stated that use of the plaintiff's hand puppets on the children's television show, Captain Kangaroo, would not substitute for the original work.¹¹⁹

2. The Court of Appeals

The United States Court of Appeals for the Second Circuit found that the district court failed to assess the purpose of the defendant's

110. *Id.* at 65.

111. *Ringgold*, 1996 WL 535547, at *3.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Amsinck*, 862 F. Supp. at 65.

116. *Woods*, 920 F. Supp. at 65.

117. *Amsinck*, 862 F.Supp. at 1049.

118. *Id.*

119. *Mura v. CBS*, 245 F. Supp. 587 (S.D.N.Y. 1965).

use which was to decorate a television set.¹²⁰ First, the defendant's use of Ringgold's work for decoration was not even remotely similar to the uses Congress declared in §107 of the Copyright Act of 1976, which include criticism, comment, news reporting, teaching, scholarship, or research.¹²¹ Second, the defendant's use was not transformative; it did not add something new or alter the first creation with a new expression or meaning.¹²² The court noted that although no one would purchase a videotape or watch the ROC episode to view the poster, the challenged use does not need to supplant the original itself.¹²³ As Justice Story stated in *Folsom*, the use need only supplant the "objects" of the original.¹²⁴

The Court of Appeals heeds a warning and asks the district court to be careful not to draw too close an analogy between works of art and written works.¹²⁵ Books are traditionally marketed to the one time reader.¹²⁶ When a book takes a substantial portion of another book which contains protectable expression, solely to convey the original text to the reader without adding any additional comments or criticisms, the second work is said to have supplanted the original because the reader has no reason to read the original work.¹²⁷ By contrast, a visual work is created, sold, and licensed for repetitive viewing and therefore use of a visual work in a television show may not supplant the original and in fact, may increase a person's desire to view the work again.¹²⁸ Simply because the television show does not supplant the original need to see the work does not mean the defendant's use of the work favors fair use.¹²⁹

120. *Ringgold*, 126 F.3d at 79.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* The court admits in a footnote that Ringgold's work may also serve the purpose of "illuminating human understanding, providing inspiration, or provoking thought." However, in doing so, it is also serves a decorative purpose.

125. *Ringgold*, 126 F.3d at 79.

126. *Id.*

127. *Id.*

128. *Id.*

B. The Nature of the Copyrighted Work

The district court easily found the second factor to weigh in favor of the plaintiff because Ringgold's art is creative, imaginative, and original.¹³⁰ The court cited *New Line Cinema Corporation v. Bertlesman*, which involved the creation of a song parody from the movie series, "A Nightmare on Elm Street."¹³¹ The court in *New Line* found that the Nightmare series was clearly a creative and original series of films and stated that the more creative a work, the more protection it should be accorded from copying.¹³² The Court of Appeals simply accepted the district court's conclusion without adding any further analysis and thus, the second factor weighed in favor of the plaintiff.¹³³

C. The Amount and Substantiality of the Portion Used in Relation to the Entire Work

1. The District Court

The district court, in determining that the defendants use of the poster was only minimal, gave several reasons why this factor weighed in favor of the defendants.¹³⁴ First, the majority of the shots of the poster only included the bottom right hand corner of it and when the entire poster was shown, it was not in focus.¹³⁵ Additionally, the poster was visible for only a few seconds at a time and was not readily discernible to someone looking for the poster, much less recognizable to the average viewer who would not have been focusing on the background.¹³⁶ Finally, the district

130. *Ringgold*, 1996 WL 535547, at *4.

131. *New Line Cinema Corp. v. Bertlesman Music Group, Inc.*, 693 F. Supp.1517 (S.D.N.Y. 1988).

132. *Id.* at 1526.

133. *Ringgold*, 126 F.3d at 80.

134. *Ringgold*, 1996 WL 535547, at *4.

135. *Id.*

136. *Id.*

court stated the defendant did not capitalize on the true essence of the poster.¹³⁷

Again, the district court in *Ringgold* looked to *Ansinck v. Columbia Pictures Industries* to determine whether this factor precluded a finding of fair use.¹³⁸ In *Ansinck*, the court found that despite displaying the mobile in its entirety, the mobile was seen only for a few seconds at a time.¹³⁹ Additionally, the artwork was only displayed for a total of ninety-six seconds.¹⁴⁰ Although use of an entire work will normally not be considered fair, the court in *Ansinck* determined that the defendant's short use of the plaintiff's mobile in the movie would be considered fair.¹⁴¹

2. The Court of Appeals

The court of appeals stated that the district court properly considered the brief intervals in which the poster was shown, the fact that in some segments only portions of the poster were shown, and that when the entire poster was shown, it was out of focus.¹⁴² The appellate court stated that it would weigh the third factor less strongly than the district court, but conceded that it is the job of the fact finders in the district court to decide this point.¹⁴³ The court admitted though that the "ultimate conclusion is a mixed question of law and fact."¹⁴⁴

The appellate court did heed a warning to courts considering the fair use defense in the context of visual works.¹⁴⁵ It stated that courts should not allow this factor to tip the scales too easily in favor of those defendants for which the other three factors do not favor.¹⁴⁶ If this is done, a defendant can escape liability by

137. *Id.*

138. *Id.* at *2.

139. *Amsinck*, 862 f. Supp. at 1050.

140. *Id.*

141. *Id.*

142. *Ringgold*, 126 F.3d at 80.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

claiming a small infringement while using a creative work which does not serve any of the purposes stated in the Copyright Act.¹⁴⁷

D. The Effect of Use Upon the Potential Market for or Value of Copyrighted Work

1. The District Court

The district court found that this factor weighed in favor of the defendants because their use of the poster for a television show was not a substitute for the poster or the art.¹⁴⁸ Therefore, there was little likelihood of adverse impact on the poster's sales.¹⁴⁹ Ringgold admitted that numerous posters have been sold since 1988 and her ability to license the poster has not been negatively impacted.¹⁵⁰

In support of its views in *Ringgold*, the district court used both *Ansinck* and *Mura* in analyzing the fourth factor.¹⁵¹ In *Ansinck*, the court stated the defendant's use of the plaintiff's mobile did not hurt her sales because the copying could not be used as a substitute for her work.¹⁵² Additionally, the film posed no threat to licensing the artwork or selling the artwork to motion pictures, and actually the use could increase its sales.¹⁵³ Similarly in *Mura*, the court found the television show's use of the puppets stimulated sales instead of prejudicing them.¹⁵⁴

2. The Court of Appeals

The court of appeals found the district court opinion flawed in two respects. First, the district court relied primarily on the fact

147. *Ringgold*, 126 F.3d at 80.

148. *Ringgold*, 1996 WL 535547, at *4.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Amsinck*, 862 F. Supp. at 1049.

153. *Id.*

154. *Mura*, 245 F. Supp. at 590.

that the television show, ROC, had little likelihood of adversely affecting poster sales.¹⁵⁵ Second, Ringgold had not shown any negative impact on her ability to license the poster.¹⁵⁶ The court of appeals stated that Ringgold does not need to show a decline in the number of licensing requests for her poster.¹⁵⁷ Instead, she only needs to show a “traditional, reasonable, or likely to be developed” market for the licensing of her poster as a set decoration.¹⁵⁸ Relying on *Campbell v. Acuff-Rose*, the court concluded that “unrestricted and widespread conduct of the sort engaged by the defendants...would result in substantially adverse impact on the potential market for [licensing of] the original.”¹⁵⁹

IV. IMPACT

The decision in *Ringgold* will make it difficult for movie or television producers to succeed in a fair use defense when using visual art in their set dressings or props. The Second Circuit has given visual artists strong rights to protect their works from infringement on film. Additionally, the court of appeals solidified the district court decision in *Woods*, which enjoined the distribution of “12 Monkeys” at the height of its theatrical release.¹⁶⁰ No longer will film and television users be able to use now, and pay later, as the court noted in *Woods*.¹⁶¹ Clearly the decision in *Ringgold* will force the district courts to more carefully review an infringement case which uses fair use as a defense.

In addition to affecting the film and television industry, the decision in *Ringgold* may effect the computer industry, more specifically the use of copyrighted works on the Internet. In a footnote, the court discussed the extraordinary possibilities that today’s technology has created, not to mention what the

155. *Ringgold*, 126 F.3d at 81.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Woods*, 920 F. Supp. at 65.

possibilities could be in the future.¹⁶² The court gave an example of a news program which recommends that its viewers tape the newscast which shows a copyrighted work, scan the tape and, with digital photographic technology, produce a perfect copy of the original without paying the customary price of the artwork.¹⁶³ This, claimed the court, would not be fair use.¹⁶⁴

The example used by the court in its footnote could be applicable to the Internet. Today millions of people and businesses have web pages and scanners. As a result, people are capable of taking a picture, scanning it onto their computer, and either placing it on a web site, displaying it as wallpaper as the background for their computer screen, or as an icon for their computer.¹⁶⁵ All of these examples are unauthorized copies of copyrighted works and therefore would constitute copyright infringement. If the infringers claimed fair use, *Ringgold's* analysis would seem to clearly pave the way to finding for the artist whose work has been copied and used on the Internet or a computer's hard drive. The innovation of computers and the popularity of the Internet and scanners can be easily comparable to the invention of the betamax machine in *Sony*. With respect to this new technology the court in *Sony* noted, "It may well be that Congress will take a fresh look at this new technology, just as it so often has examined other innovations in the past. But it is not our job to apply laws that have not yet been written."¹⁶⁶

V. CONCLUSION

The Court of Appeals for the Second Circuit remanded the plaintiff's copyright infringement claim to the district court "to afford an opportunity for further development of the record and a

162. *Ringgold*, 126 F.3d at 80.

163. *Id.*

164. *Id.*

165. Patrick W. Begos, 'Ringgold': *Visual Art in Hollywood and Cyberspace*, N.Y.L.J., October 6, 1997, (visited May 10, 1998) <<http://www.ljextra.com/copyright/1006ringgold.html>>.

166. *Sony*, 464 U.S. at 456.

sensitive aggregate assessment by the fact-finder of the fair use factors in light of the applicable legal principles.”¹⁶⁷ Additionally the court of appeals directed the district court to renew consideration of the plaintiff’s claims under the New York Artist’s Authorship Rights Act.¹⁶⁸ Finally, due to Ringgold’s failure to challenge the dismissal of her preempted unfair competition claim, the court of appeals dismissed that claim.¹⁶⁹

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167. *Ringgold*, 126 F.3d at 81.

168. *Id.*

169. *Id.* at 82.

